

## **Sarajlic (Migration) [2018] AATA 5819 (27 November 2018)**

### **DECISION RECORD**

|                           |                                                                                                            |
|---------------------------|------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                               |
| <b>REVIEW APPLICANT:</b>  | Ms Sadeta Mrzljak                                                                                          |
| <b>VISA APPLICANT:</b>    | Mr Namir Sarajlik                                                                                          |
| <b>CASE NUMBER:</b>       | 1713864                                                                                                    |
| <b>REFERENCE(S):</b>      | BCC2016/2132332                                                                                            |
| <b>MEMBER:</b>            | James Lambie                                                                                               |
| <b>DATE:</b>              | 27 November 2018                                                                                           |
| <b>PLACE OF DECISION:</b> | Brisbane                                                                                                   |
| <b>DECISION:</b>          | The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa. |

Statement made on 27 November 2018 at 2:18pm

### **CATCHWORDS**

*MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – understanding of each other's finances – married since 2016 – spent some 4 months together in Bosnia and Herzegovina – paucity of evidence – decision under review affirmed*

1.

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 5F, 65*

*Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221*

### **CASES**

*He v MIBP [2017] FCAFC 206*

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 June 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because there was insufficient evidence of a genuine and continuing relationship.
5. The review applicant appeared before the Tribunal on 18 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Sarajlic and Ms Renata Mrzljak. The hearing was conducted with the assistance of an interpreter in the Bosnian language.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

7. The issue in the present case is whether Ms Mrzljak and Mr Sarajlic are in a genuine spousal relationship within the meaning of the Act and Regulations.

#### **Whether the parties are in a spouse or de facto relationship**

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

### **Are the parties validly married?**

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties provided a marriage certificate dated 10 May 2016 issued by the State of Bosnia and Herzegovina. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

### **Are the other requirements for a spouse relationship met?**

11. Both of the parties were born in 1971. Ms Mrzljak has been previously married, that marriage ending in divorce on 3 August 2014. She has five children, born between 1989 and 2007. Mr Sarajlic was not previously married and has no children.
12. The parties claim to have met on 15 August 2013 in Svornik, Bosnia and Herzegovina. Ms Mrzljak had travelled there in July 2013 to visit family. They were introduced by Ms Mrzljak's former sister-in-law, Amira Suljic. After Ms Mrzljak returned to Australia in September 2013, the parties stayed in touch. Ms Mrzljak returned to Bosnia and Herzegovina on 10 June 2014 until 14 July 2014. On one of Mr Sarajlic's accounts, Ms Mrzljak stayed with him at his home and they made their relationship public. On Ms Mrzljak's account, they spent most of their time together but did not commence a relationship until her divorce was finalised (i.e., after her return to Australia). In January 2016, the parties agreed to marry. Ms Mrzljak returned to Bosnia and Herzegovina on 26 April 2016 and the marriage took place on 10 May. Ms Mrzljak returned to Australia on 11 June 2016. She subsequently visited from December 2016 to January 2017, from August 2017 to September 2017 and from March to April 2018.
13. The financial aspects of the relationship
14. In assessing the financial aspects of the relationship I have considered the joint ownership of assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed by one party to the other, and any sharing of day-to-day household expenses.
15. Ms Mrzljak has been on a disability support pension since about 2014. Before that, she was a co-recipient of her former husband's disability support pension. Other than some occasional casual cleaning, ironing and letterbox delivery, she has not worked since 2000. She has rented her home from the Housing Commission since about 2007. There was no property settlement from the divorce. Her overseas travel is paid for by her children.
16. Mr Sarajlic has held no formal employment since the mid-1990s. Until his mother entered a nursing home in November 2017, he subsisted on her pension and occasional remittances from a sister and a brother who live in Western Europe. He is a barber and sometimes works casually in that capacity.
17. Ms Mrzljak claims to have made occasional remittances to support Mr Sarajlic. She instanced Western Union remittances of up to \$150. She also claimed to have given him a Commonwealth Bank travel credit card and to have made deposits of \$80 to \$240 from time to time for his use. There is no documentary evidence of any such transfers.
18. At the hearing, Mr Sarajlic showed some very basic knowledge of Ms Mrzljak's financial affairs, although his claim that if he needed money he would just ask her for it does not seem to indicate any reasonable understanding of her straitened situation. Mr Sarajlic's financial situation appears opaque to me and Ms Mrzljak was not able to provide much clarification other than that he lives on handouts from her and his siblings. No documents of any description were produced to provide insight into any aspect of his financial affairs.

19. As the parties live in separate countries, it is not to be expected that they should integrate their financial affairs. However, given the length of time the parties have been married and the significance given to the lack of clarity by the delegate, it is to be expected that some evidence might be produced and that the parties would have a meaningful understanding of each other's finances. I therefore give some weight to the paucity of the evidence of this factor.

20. The nature of the household

21. In assessing the nature of the household, I have considered any joint responsibility for care and support of children, the parties' living arrangements, and any sharing of housework.

22. I acknowledge that, as the parties live in separate countries, their opportunities for establishing a joint household are limited. I have, however, given some weight to the length of time they claim to have spent with each other since 2014.

23. At the hearing, both parties made submissions about Mr Sarajlic's relationship with Ms Mrzljak's youngest son, Elvin. Four photographs were produced showing Mr Sarajlic with Elvin on what appears to be two occasions. However, Mr Sarajlic did not demonstrate much familiarity with Elvin, other than to say he enjoys football. He did not mention his other interests or volunteer material beyond anything directly asked of him. He claims to have sent birthday gifts to him but no material of this nature was in evidence and he was unable to nominate the month in which his birthday falls.

24. In his statement in response to the Department's request for further information in 2016, Mr Sarajlic spoke of his and Ms Mrzljak's intention to have children. In view of the parties' ages this seems an unlikely proposition. Ms Mrzljak never mentioned it.

25. Mr Sarajlic was aware that Ms Mrzljak receives financial assistance from time to time from her children. He demonstrated no insight into the fact that his requesting money from her was in effect taking money from her children.

26. The evidence of both parties as to the household arrangements during the time they have spent together was extremely vague. Nothing giving any insight to their domestic affairs was volunteered beyond their testimony that Ms Mrzljak loves to cook and that Mr Sarajlic loves beans. Even these details were the result of direct questioning and not much can be made of their consistency. Their evidence as to Mr Sarajlic's interests was not consistent: he spoke about his enthusiasm for playing sport while she said that he no longer participates.

27. Otherwise, no material beyond that already given to the delegate was furnished to the Tribunal. The delegate considered that material inadequate and with that view I agree.

28. Social aspects of the relationship

29. In assessing the social aspects of the relationship, I have considered whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the persons plan and undertake joint social activities.

30. Other than the four photographs depicting Mr Sarajlic with Elvin, the parties have produced no photographs of themselves in a social setting or with any other people.

31. The parties married in Gornij Rahic, the family village of Ms Mrzljak. According to the parties, the ceremony at the registry office was attended by only two witnesses, Bajram Mukonabic and Muharem Idrismovic, who are relatives of Ms Mrzljak. Bajram is married to

Ms Mrzljak's sister Meblida. Mr Sarajlic was unable to provide Muharem's surname to the Tribunal and said he met him for the first time at the wedding and has not seen him since. Meblida, for reasons neither party could explain, was not at the ceremony. No-one from the groom's side attended. Following the ceremony the bride, groom, Meblida and Bajram went to dinner. There were no other guests. There are no photographs. Mr Sarajlic, in his interview with the Department, stated that Bajram was not present but stated to the Tribunal that he was. No material was presented from any of these potential witnesses. It is very difficult to give any weight in favour of the applicant on the social aspects of the relationship on this evidence.

32. Two form 888 statutory declarations were provided to the Department with the initial application, from Amira and Vahidin Suljic (Mrs Suljic having introduced the couple). The delegate found inconsistencies in Mr Suljic's claim to have known Mr Sarajlic for 35 years. Neither party was called by Ms Mrzljak.
33. Other than the persons named above, the only others claiming to know of the relationship are Ms Mrzljak's children and her treating psychiatrist. The psychiatrist's knowledge is confined to what he has been told by Ms Mrzljak.
34. Otherwise, no material beyond that already given to the delegate was furnished to the Tribunal. The delegate considered that material inadequate and with that view I agree.
35. The nature of the parties' commitment to each other
36. In assessing the nature of the parties' commitment to each other, I have considered the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
37. I give weight to the fact that the parties have been married since 2016 and that Ms Mrzljak, although of limited means, has spent some 4 months in Bosnia and Herzegovina since the marriage. I also give some weight to the testimony of the parties as to the companionship and emotional support they draw from each other and their claims that they see the relationship as long term.
38. The only evidence of telephone communications between the parties are some screenshot text messages, mostly from April 2016 and a short series from February/March 2017. They are almost all in Bosnian and no translation has been provided. I can give very little weight to these. No further material was provided.
39. I have considered the letter from Ms Mrzljak's treating psychiatrist, which reports a timeline narrated by Ms Mrzljak and gives an opinion that her mental health would benefit from Mr Sarajlic joining her in Australia. I can give this only limited weight, relying as it does on Ms Mrzljak's subjective reporting.
40. I have also considered the written statements from two of Ms Mrzljak's daughters. One daughter, Renata, gave evidence at the hearing that the relationship was good for her mother. I note that she did not attend the wedding and has only had very limited communications with Mr Sarajlic.
41. Following the hearing, the Tribunal received notification that Ms Mrzljak has formally changed her name to Sadeta Sarajlic. I give this some weight, but note that she waited almost two and a half years to do this. There is, of course, no adverse inference to be drawn from whether or when parties choose to change their names. However, in the absence of an explanation as to the decision and its timing, no special weight can be given to it.

42. On the whole, the absence of evidentiary material that might assist this assessment is surprising. It is to be expected that telephone records, cards, letters, photographs and keepsakes would be available. Except where otherwise indicated (and this material is scant), none was produced.
43. Having regard to all of the circumstances of the relationship, there is simply insufficient evidence to be satisfied that the parties have formed a mutual commitment to a shared life to the exclusion of others, that this is a genuine and continuing relationship, or that the parties have formed the intent to live together on a permanent basis.
44. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or the time of this decision.
45. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.
46. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

### **DECISION**

47. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day-to-day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).